No 138 (23)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THOMAS W. MORRELL, on behalf of himself and all other persons similarly situated,

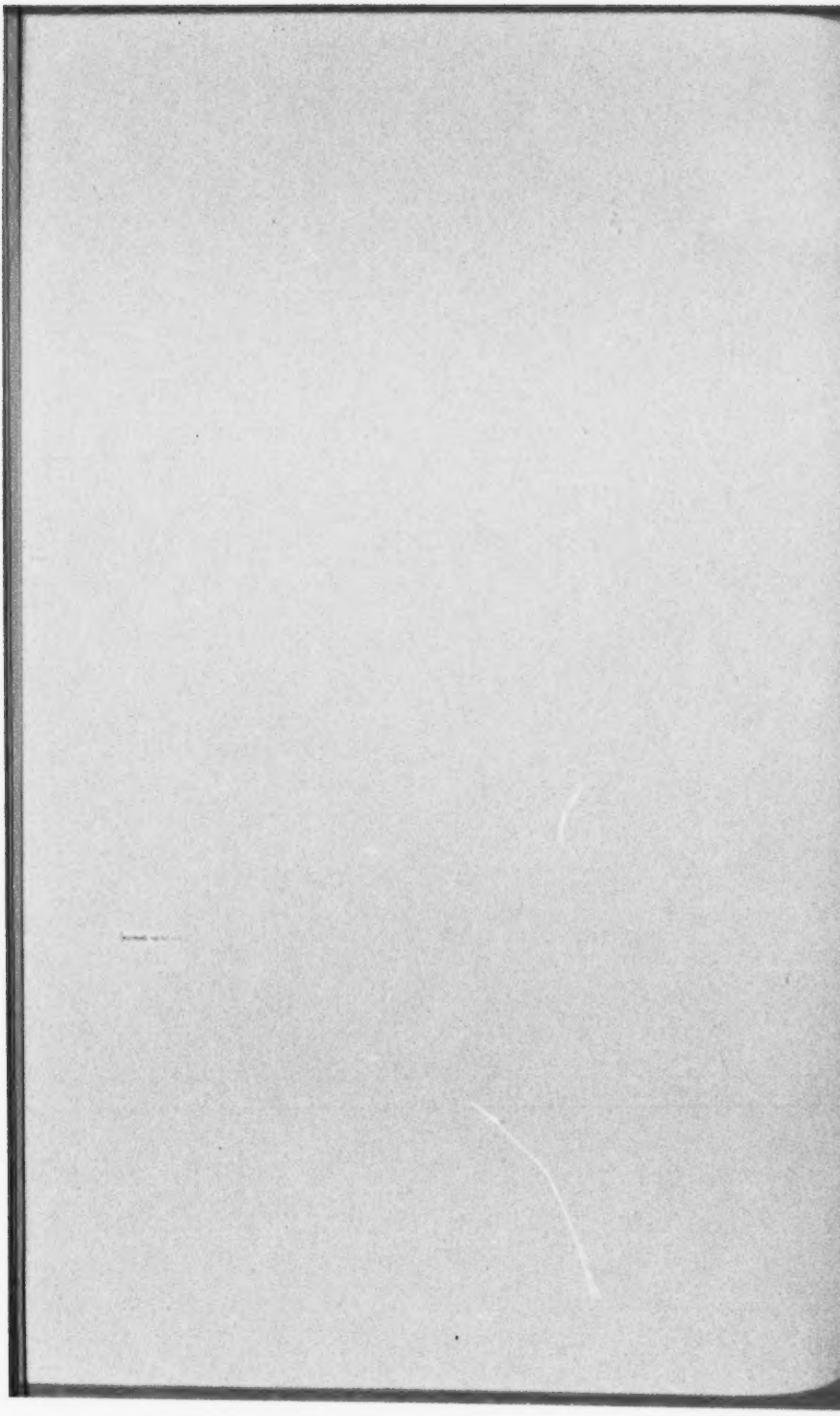
Petitioner,

against

THE CITY OF NEW YORK, PELHAM ST. GEORGE BISSELL, as Presiding Justice of the Municipal Court of the City of New York; JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York; GEORGE J. MCMAHON, as Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District; ALMERINDO PORTFOLIO, as Treasurer of the City of New York; PAUL KERN, as President of, and FERDINAND Q. MORTON and WALLACE S. SAYRE, as members of and constituting the Municipal Civil Service Commission of the City of New York.

PETITIONER'S REPLY BRIEF

DAVID V. CAHILL,
Attorney for Petitioner.



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PETITIONER'S REPLY BRIEF

The petitioner respectfully submits the following brief in reply to the respondent's brief:

I.

The statement of the questions presented, as given in respondent's brief in opposition to the petition herein, is neither accurate nor complete.

(a) It is stated in respondent's brief that the Board of Estimate was without power to defy the State Civil Service

Commission and to tolerate the continuance of petitioner and others similarly situated in the office. It is urged that the subordination of municipal authority to state authority raises no federal question. The latter proposition is true, but petitioner has not contended that there is any such federal question in this case. The question here is whether petitioner and others similarly situated, after having been lawfully appointed as Assistant Court Clerks, could be deprived of their property right in their offices by the device of refusing to appropriate money for their salaries.

If there were any genuine question as to their title to office, it could have been raised only by a *quo warranto* proceeding.

Greene v. *Knox*, 175 N. Y. 432, 437.

It is not questioned in respondent's brief that petitioner and the other clerks were validly appointed. Petitioner's salary was paid from September 16, 1932 to December 31, 1933 (Record fols. 167-168). The others were similarly paid from the dates of their appointment, some as far back as January, 1931 (pp. 81, 83, 85, 87). Their appointments were shown by Plaintiff's Exhibit 1 (R. pp. 79-97). The appointment of Morrell was for an unexpired term beginning September 16, 1932 and to expire December 31, 1936 (p. 97). The others having been appointed in 1931, were paid until December 31, 1933. These appointments were made at a time when the offices were in the exempt class.

There is no question that their right to the offices and to the salaries attached to those offices constitutes property.

> "The salary of an officer is property, the right to which depends upon the right to the office, and the former cannot be constitutionally taken away until the latter is destroyed."

Greene v. *Knox*, supra.

Therefore, the federal question presented to this Court is not whether municipal authorities may be subordinated to state authorities, but whether a property right may be taken away without any proceeding whatever except a failure and refusal by the local legislative body to appropriate money for the salary.

It should be noted that the letter to petitioner notifying him of the action taken in this matter did not state that he had been removed from office or that the position had been abolished, but simply that the salary attached to the office had been eliminated from the budget. The letter from the President Justice of the Municipal Court read as follows:

> "I regret to advise you that I am in receipt of information from the Budget Director's office that your position will be eliminated from the budget for 1934" (R. p. 57, fols. 170, 171).

The Board of Estimate, which failed and refused to make the necessary appropriation, was not the body which made the appointments, nor did it have any control by law over such an appointment. The right of appointment was given by Section 1373 of the Greater New York Charter, a state law, to the justices of the court. The section of the Charter referred to has been set forth in full in our petition.

(b) Point 2 of respondent's brief, to the effect that a validly appointed employee of the City, who is refused his salary, although entitled to it by contract with the City, cannot sue for his salary, gives emphasis to the contention of petitioner not only that he is being deprived of a property right but that the obligation of a contract is being impaired. The contention of respondent is that petitioner must apply for an order of a competent court commanding the budgetary bodies of the City to restore the abolished position.

The first answer to this suggestion is that petitioner does not seek a restoration of an abolished position, but contends

that the position in question was never abolished. His prayer for relief (R. p. 27) asks for a money judgment for the amount of the salary due and also asks that the proper certification of the position which he held be made. The writ of mandamus and other similar writs have been abolished by the State of New York, but under Article 78, Sections 1283-1285, of the Civil Practice Act, appropriate orders directing the granting of certain relief are authorized, substantially as under the old procedure. However, there is no provision of state law which takes away from litigants like the present petitioner the right to sue on contract. If there were any such limitation of petitioner's right it would be unconstitutional under the circumstances of the case at bar. It is submitted that any such remedy as mandamus or a similar order would not be appropriate in this cause. No official or body could be commanded to pay a salary until he had established by appropriate action the right to the salary and that he had rendered services for the salary. There are numerous reported instances showing the application of the mandatory remedy; for example, the case of *Matter of Coombs* v. *Edwards*, 280 N. Y. 361. In that case a judgment-creditor, having obtained a judgment against the City of Long Beach, applied for an order to compel the appropriate city officials to include the amount of his unpaid judgment in the city budget. This obviously is a more appropriate case for the issuance of a mandatory order than the case at bar would be. However, even in that case the application for the order was denied and the court said of the remedy (p. 364):

> "It is employed only in cases where other remedies fail and the conditions surrounding its use are not found in the ordinary suit at law."

In this instance logically the petitioner was obliged to establish his right to the salary before he could apply to the court for an order directing its payment.

Respondents have cited *Thoma* v. *City of New York*, 263 N. Y. 402, 407. The case has no application to the case at bar. In that case the plaintiff, having been appointed an engineer at a salary of $3,008, was reduced to $2,760. However, it appears that in the grade to which he was appointed the salaries ranged from $2,760 to $3,008. Therefore, he was neither removed from office nor was his grade changed. In the discretion of the appointing officials the salaries were changed within the grade to which he was appointed, and the power of the officials to make the change of salaries was clear. The court's decision was simply that the action of the officials was lawful. There is a dictum to the effect that if the plaintiff in that case was unlawfully removed his remedy was by mandamus. In the case at bar there was neither a removal nor a demotion, but only a withholding of salary.

As the matter stands the validity of petitioner's appointment is conceded. There is no way of depriving him of his right to obtain the salary except by a proceeding to prove that he had no right to the office.

(c) The third point in respondent's brief discusses a question which has no point on this application. It is conceded that the state has power to abolish a public office under proper conditions. Petitioner's office was not abolished and his right to hold it continued, the validity of his appointment being conceded. What the City seeks in this case is to eliminate him from the office by refusing to pay his salary, and therefore to accomplish indirectly what could not be done directly, that is, to remove him without trial or process of any kind.

(d) As has been already demonstrated in the argument submitted with the petition, no formal certification to the effect that a federal question was raised in the state court is necessary. It has been expressly held that if the state

court necessarily passed upon the federal question it is available in this Court.

St. Louis, etc., Ry. Co. v. *Starbird,* 243 U. S. 592, 594;
Crowell v. *Randell,* 10 Pet. 368;
Cissna v. *Tennessee,* 246 U. S. 289, 294.

The form in which the matter was presented in petitioner's brief in the Court of Appeals is immaterial. The record of the Court of Appeals is before the Court and it shows clearly that in effect the questions now presented to this court were litigated and that this cause could not have been determined by the Court of Appeals without passing on those questions.

Respectfully submitted,

DAVID V. CAHILL,
Attorney for Petitioner.